

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEVIN MC DOWELL
Claimant

VS.

FRITO LAY, INC.
Respondent
Self-Insured

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}

Docket No. 187,352

ORDER

Claimant appeals from a March 28, 1995 Nunc Pro Tunc Order Denying Compensation by Administrative Law Judge James R. Ward.

ISSUES

On appeal, claimant contends the Administrative Law Judge exceeded his jurisdiction in denying benefits because the evidence establishes that claimant has met his burden of proving a compensable workers compensation claim in that the injury suffered and his current need for preliminary hearing benefits is the direct result of an accident which arose out of and in the course of his employment with respondent. The sole issue before the Administrative Law Judge is whether claimant has met his burden of proving that he sustained injury by accident which arose out of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds, for preliminary hearing purposes, as follows:

The issue presented is one from which the Appeals Board may review a preliminary hearing order pursuant to K.S.A. 44-534(a)(2) and K.S.A. 44-551(b)(2)(A), as amended by S.B. 59 (1995).

The Administrative Law Judge found that claimant's knee popped September 10, 1993 while walking through a doorway at work. He concluded that the evidence failed to establish that this constitutes an accident or injury as defined in K.S.A. 44-508(d) and (e), respectively, in that there did not appear to be a causal connection between the employment and the pathology in claimant's knee. The Appeals Board agrees with the findings and conclusions of the Administrative Law Judge.

Claimant bears the burden of proof to establish his claim. "Burden of proof" is defined in K.S.A. 44-508(g) as "... the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

"... on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In

determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

In order to recover, the claimant must establish he has sustained a personal injury by accident arising out of and in the course of his employment. K.S.A. 44-501(a). "Personal injury" is defined in K.S.A. 44-508(e) as:

"... any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living."

"The terms "injury" and "accident" are not synonymous. Each must be established by the claimant. An "accident" is "... an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force." K.S.A. 44-508(d). An accident is an event which causes an injury. The injury is a change in the physical structure of the body which occurs as a result of the accident. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 317, 573 P. 2d 1025 (1978).

Further, the claimant must establish that he has sustained an accident and injury arising out of the employment and in the course of the employment. These are separate elements which must be proven in order for the claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). In order to establish that the incident "arose out of the employment", the claimant must show that there is some causal connection between the accident, injury and the employment. To do this, it must be shown that the injury arose out of the nature, conditions, obligations and incidents of the employment. Only risks associated with the work place are compensable. "In the course of the employment" relates to the time, place and circumstances under which the accident occurred, and that the injury happened while the employee was at work at his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

The Kansas Supreme Court has ruled that it is not necessary for the injury to be caused by trauma or some form of physical force to be compensable. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 379, 573 P.2d 1036 (1978). Personal injury or injury results from an accident which can occur in a single event or from a series of events which occur over time. The event or events do not have to be traumatic or manifested by force. Rather, an accident can occur when, as a result of performing his or her usual tasks in their usual manner, the employee suffers an injury. Downes v. IBP, Inc., 10 Kan. App. 2d 39, 41, 691 P.2d 42 (1984), rev. denied 236 Kan. 875 (1985). Also, it is well settled in this state that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984). Demars v. Rickel Manufacturing Corporation, *supra*; Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

It is not disputed that claimant was at work and, thus, in the course of his employment when his knee popped on September 10, 1993 while walking. It is disputed, however, that this injury arose out of the employment. The evidence fails to show any risk associated with the employment separate and apart from the normal activities of day-to-day living which caused or contributed to claimant's injury.

Claimant had a prior compensable work-related injury on June 17, 1986. The Appeals Board, likewise, agrees with the Administrative Law Judge that the evidence does not demonstrate that claimant's present need for treatment is related to that injury.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the March 28, 1995 Nunc Pro Tunc Order of Administrative Law Judge James R. Ward should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1995.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

c: Roger D. Fincher, Topeka, KS
Matthew Stretz, Kansas City, MO
James R. Ward, Administrative Law Judge
Philip S. Harness, Director